90-398

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CARL RAY HELMS, DENNIS HARRIS
and SHIRLEY HARRIS,

PETITIONERS

VS.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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June 25, 1990

QUESTION PRESENTED

Did the Court of Appeals err in holding that cumulative sentences of seventy-five (75) years for Carl Ray Helms and sixty (60) years for Dennis and Shirley Harris were not constitutionally disproportionate?

LIST OF PARTIES

Carl Ray Helms, Dennis Harris, Shirley Harris,
Appellants below and Petitioners herein

The United States of America,
Appellee below and Respondent herein

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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Petitioners, Carl Ray Helms, Dennis Harris and Shirley Harris, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on March 26, 1990.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit was ordered published, but has not yet been reported. It does,

however, appear as a slip opinion, styled *United States v. Helms, et.al.*, No. 88-1232 (5th Cir. March 26, 1990). A copy of that opinion appears in the appendix. No motion for rehearing was sought.

JURISDICTION

As stated above, on March 26, 1990, the Court of Appeals for the Fifth Circuit entered an opinion and judgment affirming the convictions of Petitioners. The petition for writ of certiorari is timely filed on or before June 25, 1990.

Petitioners were convicted in the United States District Court, Northern District of Texas, for violations of 18 U.S.C. Sec. 371; 18 U.S.C. Sec. 1341 and 18 U.S.C. Sec. 1343. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. Sec. 1254(1) and SUP. CT. R. 13.1.

CONSTITUTIONAL PROVISION

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Carl Ray Helms, Dennis Harris and Shirley Harris were charged by superseding indictments with one count of conspiracy to commit wire and mail fraud in violation of 18 U.S.C. Sec. 371 and twenty-eight (28) substantive counts of mail fraud and thirteen (13) substantive counts of wire fraud in violation of 18 U.S.C. Secs. 1341 and 1343. All three Petitioners were convicted on forty-one (41) counts.

The trial court sentenced Petitioner Helms to a term of

seventy-five (75) years' imprisonment by stacking fifteen (15) five-year sentences. The court cumulated twelve (12) sentences to reach a total of sixty (60) years for Dennis and Shirley Harris.

Viewed in the light most favorable to the verdict, the evidence at trial established that Petitioners were involved in three companies selling distributorships for various products: Raphael, Inc.; Max, Inc.; and Movies, Inc. Numerous investors testified that they were sold distributorships in these various companies. Some never received inventory or a refund. Some investors received product but could not dispose of it because it was either of low quality or was not properly marketed. Some investors testified as to various misrepresentations made by either Petitioners or other persons associated with these companies.

It is undoubted that the scope of this continuing criminal enterprise was large. Besides the numerous counts presented at trial, the Government called other investors as extraneous offense witnesses. The Government contended that Petitioners had caused more than $5,000,000.00 in losses to investors in the various companies.

Petitioners contended on appeal that their sentences were constitutionally disproportionate and excessive. The Court of Appeals disagreed, noting the size of the scheme and further citing a previous Fifth Circuit case where a seventy-five (75) year sentence was found not disproportionate for forty-five (45) counts of money order alterations. *United States v. Wheeler*, 802 F.2d 778 (5th Cir. 1986), *cert. denied*, 480 U.S. 908 (1987).

REASON FOR GRANTING THE PETITION

I.

THE FIFTH CIRCUIT COURT OF APPEALS, IN UPHOLDING THE SENTENCES ASSESSED IN THIS CASE, HAS FAILED TO PERFORM THE PROPORTIONALITY REVIEW MANDATED BY *SOLEM V. HELM*, AND HAS LET STAND SENTENCES THAT ARE GROSSLY DISPROPORTIONATE TO THE OFFENSES COMMITTED.

The opinion of this Court in *Solem v. Helm*, 463 U.S. 286, 103 S.Ct. 3001 (1983) should have put to rest the old adage that a sentence assessed within the statutory range of punishment is presumed to be constitutional. Pursuant to the opinion in *Solem*, no sentence is presumed to be constitutionally proportionate. 103 S.Ct. 3009-3010. If requested by an appellant, the reviewing court must conduct a proportionality review under the Eighth Amendment which is guided by objective criteria including (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. 103 S.Ct. 3011.

It is evident from the opinion in this case that the Fifth Circuit did not properly conduct a proportionality review of Petitioners' sentences, if such review was conducted at all. The Court did nothing more than note the gravity of the continuing scheme and cite to a case, *United States v. Wheeler*, wherein similar defendants were assessed a seventy-five (75) year penalty.

In most cases, a proportionality review will be of little avail to a defendant. Nevertheless, in cases where the penalty assessed is extreme, as is the present case, the reviewing court must accept its responsibility to conduct a thorough proportionality analysis.

Title 18 U.S.C. Secs. 1341 and 1343 provide for a maximum sentence of five (5) years' imprisonment without regard to the scope of the fraud or the amount of money lost. Congress obviously intended that these offenses not be regarded as a particularly heinous crime. Effective August 9, 1989, Congress has raised the penalty to twenty (20) years' imprisonment and potential fine of up to $1,000,000.00 if the violation affected a financial institution; otherwise, Congress has left the original penalty range untouched.

Of course, some degree of cumulation would be constitutionally permissible in these cases. Stacking twelve to fifteen separate maximum sentences is, however, extreme and constitutionally disproportionate.

As further evidence for a proportionality review, Petitioners noted that they did not have a prior criminal record. Petitioners also pointed out that in each count of the indictment, they could have been found guilty whether or not they actually mailed the letter or wire, so long as transmission of the document was a reasonably foreseeable event. Therefore a great deal of their sentences could have been based upon contingent liability for the acts of others.

More significantly, however, Petitioners' sentences were much more severe than those given to other defendants convicted of mail or wire fraud. *See United States v. Nichols*, 695 F.2d 86, 94 (5th Cir. 1982) (cumulated sentence of forty years held constitutional); *United States v. Moss*, 631 F.2d 105 (8th Circ. 1980) (cumulated sentence of twenty years not invalid); *United States v. Shaid*, 730 F.2d 225, 230 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 151 (1984) (cumulative sentence of thirty-five years not cruel and unusual given the defendants numerous past convictions); *Edwards v. United States*, 795 F.2d 958, 961 n.2 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 1899 (1987) (twenty-one year cumulative sentence for mail fraud was excessive given the defendant's prior criminal record).

The Court of Appeals cited *United States v. Wheeler*, 802 F.2d 778,783 (5th Cir. 1986), *cert. denied*, 480 U.S. 908 (1987), wherein a cumulated sentence of seventy-five (75) years was assessed for fraudulent alterations of money orders. In that case, the defendants had extensive prior records; indeed they were operating a fraudulent scheme of large scope from a prison and numerous public employees had to be compromised for this scheme to work. In any event, one abuse of discretion in the sentencing process does not justify another.

Even more disappointingly, the Court of Appeals ignored a major factor which was highly relevant to a proportionality analysis: the sentence appellants would likely have received under the sentencing guidelines. Pursuant to the sentencing guidelines now in effect, mail fraud has a basic offense level of six (6). Given an amount of loss over $5,000,000.00 the offense level would be twenty (20). The offense level would be increased to twenty-two (22) because the offense involved more than minimal planning and a scheme to defraud one or more victims. Because the defendants did not have a prior criminal record, their criminal history category would be I. Thus considered, the applicable sentencing range for the Petitioners in this case would be a term of between forty-one (41) and fifty-one (51) months.

The sentencing guidelines were enacted to prevent disparities in sentence, such as in this case. The applicable sentencing ranges reflect careful consideration by the sentencing commission of the relevant offense factors, the nature and scope of the harm and the personal characteristics of the offender. It is highly relevant that the sentencing commission would provide a sentencing range in this case that was even lower than the parole eligibility date of ten (10) years which is applicable under the sentence assessed by the trial court.

Simply because the sentencing guidelines provide for a lower sentence does not automatically show constitutional disproportionality. In the present case, however, the two

sentences are poles apart. Therefore, the applicable sentence under the guidelines provide strong evidence of the disproportionality of the sentences actually assesed by the trial court.

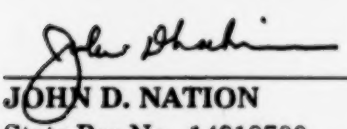
Petitioners are mindful that reviewing courts will pay great deference to the trial court's determination of sentencing matters. Petitioners also recognize that reviewing courts do not want to engage in a regular practice of reviewing discretionary decisions by trial courts in passing sentence. Nevertheless, from time to time an extreme sentence will be assessed by a trial court for whatever reason. In these instances, an appellate court must shoulder its responsibility to conduct a proportionality review to insure that an injustice is not committed. This the Court of Appeals did not do.

The trial in this cause lasted many weeks and certainly consumed many hours of the trial court's valuable time. It is evident from the record that the court became exasperated with defense counsel over the length of trial and it is certainly possible that some of this frustration was taken into account in sentencing the Petitioners. The sentences assessed were harsh in the extreme, and, even considering the scope of the offense, were constitutionally disproportionate. Because the Court of Appeals failed in its responsibility to conduct an adequate proportionality review, this Court should grant Petitioners' petition for writ of certiorari and remand the cause so that a proper analysis may be performed.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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June 25, 1990

UNITED STATES of America,
Plaintiff-Appellee,

v.

Carl Ray HELMS, Dennis Harris, Charles E. Vandervort,
Shirley Harris, and Paul Earl Briggs,
Defendants-Appellants

No. 88-1232

United States Court of Appeals,
Fifth Circuit

March 26, 1990.

Appeals from the United States District Court for the Northern District of Texas.

Before WISDOM, JOHNSON, and DUHE, Circuit Judges.

JOHNSON, Circuit Judge:

The five appellants, Carl Helms ("Helms"), Dennis Harris, Shirley Harris, Paul Briggs ("Briggs"), and Charles Vandervort ("Vandervort"), were charged in a forty-two count indictment Helms, Dennis Harris, and Shirley Harris were convicted on the forty-one counts which were submitted to the jury. Briggs and Vandervort were convicted on some, but not all of the counts charged. Appellants raise numerous arguments on appeal. This Court affirms.

I. FACTS AND PROCEDURAL HISTORY

The superseding indictment filed on August 11, 1987, charged the appellants with conspiracy to commit wire fraud and mail fraud in violation of 18 U.S.C. Sec. 371. The indictment also charged twenty-eight substantive counts of mail fraud, in violation of 18 U.S.C. Sec. 1341, and thirteen substantive counts

of wire fraud, in violation of 18 U.S.C. Sec. 1343.[1] The indictment also named Fred Ellis ("Ellis"), Carol Dunn ("Dunn"), Ron Perry ("Perry"), Larry Stout ("Stout"), and William Pike ("Pike").[2]

Appellant Helms, Dennis Harris, and Shirley Harris were each charged and convicted on all forty-one counts. Helms was sentenced to consecutive terms of five years' imprisonment on fifteen counts for a total of seventy-five years. Dennis and Shirley Harris were each sentenced to consecutive terms of five years imprisonment on twelve counts for a total of sixty years each. Briggs was convicted on the conspiracy count and on thirty of the thirty-two substantive counts with which he was charged. Vandervort was charged only in the first thirty counts of the indictment. Vandervort was acquitted on the conspiracy count, and convicted on thirteen substantive counts. Briggs and Vandervort were each sentenced to consecutive terms of five years' imprisonment on five counts for a total of twenty-five years each.

This Court must view the facts of this case in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). The evidence presented related principally to four enterprises: National Chem Tech Chemical Company ("NCTC"), Raphael, Inc. ("Raphael"), Max, Inc. ("Max"), and Movies, Inc. ("Movies"). The enterprises sold "distributorships" for various products. The distributorships were sold at a cost of up to $9,900.00 each, to investors around the country.

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1. One substantive count, number 25, was dismissed before the case was submitted to the jury.

2. Ellis and Perry both entered guilty pleas. Dunn, who does not appeal, was convicted on two counts and acquitted on five counts. Stout was acquitted on the twelve counts with which he was charged. Pike was acquitted on the four counts with which he was charged.

NCTC began operations in 1984 and sold distributorships for commercial cleaning chemicals. NCTC closed in March of 1985. Raphael began selling distributorships for women's cosmetics shortly after NCTC closed. Raphael continued selling distributorships until June, 1986 even though the company had stopped purchasing cosmetics in January, 1986. In March, 1986, Max was formed and sold distributorships for men's cosmetics. Movies, a part of Max, was set up to sell distributorships for video cassettes. Both Max and Movies ceased operations in December, 1986.

Helms, Dennis Harris, and Shirley Harris originated or were involved in the management of all of these enterprises. Vandervort was the President of Raphael. Briggs was a salesman with NCTC, vice-president of Raphael, and President of Max.

Several investors testified at trial as to their individual experiences with the four companies. Their testimony at trial illustrates that the distributorships of each of these companies were sold by way of similar methods. An advertisement was placed to attract potential investors. People who responded to the advertisement were then contacted by a salesperson of the particular company. The salesperson would then attempt to sell the interested person a distributorship by stating, for example, that if the investor was not satisfied, he or she could get a full refund, that the particular company had been in business for several years, and that other distributorships were doing very well. The investors would then mail in all or part of the price of the distributorship. Usually, the investor received a congratulatory letter, notifying him that he had been approved for a distributorship. Some investors received a shipment of inventory, but were not instructed as to whom they were to distribute the goods. Other investors simply received nothing but apologies from the particular company for delays in shipment. Later, the investors would discover that the company from whom they had purchased a distributorship had been shut down, and the investors were unable to obtain a refund.

Each of the appellants raise several issues on appeal. These will be discussed in turn.

II. DISCUSSION[3]

A. SUFFICIENCY OF THE EVIDENCE

To support a conviction for mail fraud, the mailing involved must be "for the purpose of executing the scheme." *United States v. Toney*, 605 F.2d 200, 206 (5th Cir.), cert. denied, 444 U.S. 1090, 100 S.Ct. 1055, 62 L.Ed.2d 779 (1980) (citations omitted). Appellants Helms, Dennis Harris, Shirley Harris, and Briggs argue that the letters and mailgrams which form the basis of thirteen substantive counts, do not support convictions for mail fraud. These four appellants contend that since the mailings referred to in those thirteen counts were sent to the investors after the distributorship fee had been paid, the mailings were not sent in furtherance of the scheme. These appellants argue that the scheme had been completed once the distributorship fee had been paid. They also argue that the mailings were merely tangential to the underlying scheme, and therefore, cannot support convictions of mail fraud.

The mailings and mailgrams referred to in the challenged counts,[4] with one exception, were notifications of acceptance or acknowledgements of payment received.[5] These mailings and

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3. In addition to the claims discussed below, the appellants also raise as error various evidentiary rulings made by the district court. This Court accords great deference to the district court's evidentiary rulings. After examining the record, this Court determines that no reversible error occurred in the district court's evidentiary hearings.

4. The 13 counts challenged in this point of error are Count numbers 2, 4, 10, 14, 16, 19, 23, 30, 32, 39, 40, and 42.

5. In Count number 23, the mailing referred to was a letter to a distributor who had complained that he had not received his shipment of Raphael cosmetics within 45 days of payment. The letter explained to the investor that Raphael was behind on its shipment schedule due to an unexpected amount of reorders.

mailgrams contained various statements, such as "your inventory will arrive shortly," and that the distributor would be contacted in the "near future" regrading product delivery. The fact that these letters were sent of distributorship fees had been paid does not necessarily mean that these letters were not sent in furtherance of the scheme to defraud. *United States v. Sampson*, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962), involved the mailing of acceptance letters. In *Sampson*, the Supreme Court held that where the mails were used to lull victims by assuring them that the promised services would be performed, the mailings were for the purposes of executing the scheme. This Court has stated that "post-purchase mailings which are designed to lull the victim into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect are mailings in furtherance of the scheme." *United States v. Ashdown*, 509 F.2d 793, 800 (5th Cir.), cert. denied, 423 U.S. 829, 96 S.Ct. 48, 46 L.Ed.2d 47 (1975). Similarly, in the present case, the mailings and mailgrams were used to lull the holders of distributorships into believing that they had invested in a company which would fulfill the promises and representations previously made. The mailings and mailgrams were not simply tangential to the scheme.

Appellant Vandervort also raises a sufficiency of the evidence claim. Vandervort argues that the district court erred in denying him an acquittal because, Vandervort claims, the evidence was insufficient to support a conviction against him. Vandervort contends that a reasonably minded juror would have had a reasonable doubt as to Vandervort's role in this case. Vandervort bases this argument on the fact that he was acquitted on the conspiracy count, but convicted on thirteen substantive counts; he argues that this verdict was inconsistent. Initially, we state that a jury verdict need not necessarily be consistent. *United States v. Duvall*, 846 F.2d 966 (5th Cir. 1988). Furthermore, sufficient evidence was presented to support Vandervort's conviction. Vandervort was the President of Raphael. He had power over distribution of the bank accounts which held the fees obtained from investors. Vandervort was the "approval committee" which selected distributors for Raphael.

In April, 1986, Vandervort sent the following letter for Raphael distributors:

..... [D]ue to an unexpected amount of reorders from our distributors now in full operation we have surpassed the capability of our factory resources for a short period of time. We're now making arrangements with our factories to make an increase in output, and we should have an increase in flow of products in our facility in Dallas in the next twenty-one days.

Trial Transcript p. 1624. The last order placed by Raphael had been placed in January, 1986. The company had no money to purchase more cosmetics. The company ceased operations at the end of June, 1986. When distributors called to complain that they had not received their inventory, Vandervort told staff members to advise the distributors of false delivery dates, when the company had nothing to deliver. The evidence was sufficient to support the jury's verdict against Vandervort.

B. LEADING QUESTIONS

During the direct examination of Dennis Harris, his counsel was instructed to refrain from leading the witness, and counsel was warned on two occasions. After another leading question, the district court instructed the jury as to the definition of a leading question. The court then explained to the jury why leading questions are not to be used on direct examination. Appellants Helms, Dennis Harris, and Shirley Harris contend that the instruction which the district court gave to the jury constituted prejudicial error requiring a reversal of the convictions, and a new trial. The district court stated the following:

A lawyer might ask his own witness leading questions for any number of reasons. He may want to save time, especially on preliminary or non-contested matters. He may want to calm a witness' nervousness, who's unfamiliar with courtroom surroundings and uneasy about being up in front of you or me, and he may think the witness' testimony is not quite as good as the lawyer would like it to be, and he may want to shape the

witness' testimony by the form of his questions.

Now, on cross examination it's assumed that the witness may be adverse or hostile to the attorney asking the question so we allow leading questions to permit counsel to bring out the points that are necessary to a full understanding of the witness's testimony, such things as his recollection, his biases, his opportunity to observed the facts about which he is testifying, his veracity and so forth.

As I'll instruct you more fully at the end of the case, it will be your job to pass on the credibility of witnesses. One of the things you may want to take into account in doing that is where the lawyers in the case have asked their own witnesses leading questions you may want to consider to what extent the testimony has actually been that of the witness and to what extent it was the witness affirming what the attorney wanted to hear through the form of his questions. So that's what's meant by leading questions when I have directed Mr. Sumner [counsel for Dennis Harris] not to lead the witness.

Trial Transcript, pp. 6180-81. Appellants Helms, Dennis Harris, and Shirley Harris argue that this instruction was improper because a lawyer's questioning is a legal matter, and of little concern to the jury. Appellants argue that the instruction was prejudicial because the district court was not acting impartially, and was casting doubt upon the credibility of all of the appellants.

While the district court's elaborate instruction regarding leading questions may have been somewhat unusual, it did not amount to constitutional error. This Court grants substantial deference to a district court's role in a trial. *United States v. Carpenter*, 776 F.2d 1291 (5th Cir. 1985); *Moore v. State*, 598 F.2d 439 (5th Cir. 1979). The district court's instruction was a correct statement of the law, and was not directed specifically at the credibility of any one witness. Furthermore, the jury was also instructed not to construe from anything which the judge did or said during the trial, that the judge had an opinion as to any of the issues presented. Appellants have failed to establish that prejudicial error was committed.

C. EXCUSE OF PREGNANT JUROR

Before the third day of jury deliberations began, the trial judge was advised that a pregnant juror, Melinda Schultz ("Schultz"), was going into labor. Schultz's doctor told her not to attend jury service. The trial judge then excused Schultz as a juror.

All five appellants argue that the trial judge abused his discretion by discharging Schultz. Appellants argue that the trial judge should have postponed the trial until Schultz was able to resume her duties as a juror.

Schultz's doctor advised the district court that Schultz would be physically "out of commission" for a week. Despite this delay of only one week, the trial judge could not assume that Schultz would be mentally or physically prepared to leave her newborn and continue deliberations. This Court has stated that "it is within the trial judge's sound discretion to remove a juror whenever the judge becomes convinced that the juror's abilities to perform [her] duties become impaired." *United States v. Dominguez*, 615 F.2d 1093, 1095 (5th Cir. 1980). The district court did not abuse its discretion by excusing juror Schultz.

Appellants also challenge the substitution of alternate juror, Bruce Staffeld ("Staffeld"), for Schultz. The trial judge discussed extensively the available courses of action with trial counsel. Counsel for the appellants were unable to agree on any particular option. The trial judge then questioned alternate juror Staffeld about anything which would make Staffeld unable to begin deliberations with the other jurors as if Staffeld had been charged with those jurors initially. Staffeld stated that he had not discussed the case with anyone, had not seen anything in the media regarding the case, and that he had not been exposed to any extraneous influences.

The trial judge then questioned each of the eleven jurors, individually. Each juror stated that he or she could "wipe out all of the previous deliberations ... and start again with those deliberations just as if Mr. Staffeld had been sent in to

deliberate ... in place of Mrs. Schultz." Record Vol. 58 at 34.

The trial judge then decided to impanel alternate juror Staffeld. The trial judge instructed the jury extensively to begin deliberations anew and put all previous deliberations out of their minds. The trial judge had all notes confiscated which had been made during the previous deliberations. The record demonstrates that the trial judge was extremely careful with respect to questioning the jurors and instructing them as to how they should proceed. The trial judge was also meticulous in following the procedure set forth in *United States v. Phillips*, 644 F.2d 971 (5th Cir. 1981), for the substitution of Staffeld. Appellants have failed to show prejudice as a result of Staffeld's substitution; this Court finds no reversible error.

D. DISPROPORTIONATE SENTENCES

Appellants Helms, Dennis Harris, and Shirley Harris argue that each of their terms of imprisonment constitute cruel and unusual punishment in violation of the eighth amendment. The appellants ask this Court to remand to the district court for a reconsideration of the sentences imposed.

As stated in section I of this opinion, Helms was sentenced to a total of seventy-five years' imprisonment, Dennis and Shirley Harris were each sentenced to sixty years' imprisonment.

The district court reached this sentence by cumulating fifteen and twelve sentences, respectively, of five years each.[6] Each of these appellants had been convicted on forty-one counts and faced a potential maximum term of 205 years. Helms, Dennis Harris, and Shirley Harris contend that the government alleged only one scheme, and then subdivided this scheme into forty-one separate offenses. This Court has stated that each use

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6. The crimes committed in this case occurred prior to November 1, 1987, therefore the sentencing guidelines are not applicable.

of the mails is a separate offense under the mail fraud statute and that consecutive sentences may be imposed properly, even if the mailings arose from a single concerted plan to defraud." *United States v. Shaid*, 730 F.2d 225, 230 (5th Cir. 1984), cert. denied, 469 U.S. 844, 105 S.Ct. 151, 83 L.Ed.2d 89.

The district court has broad discretion in sentencing determinations. *United States v. Nichols*, 695 F.2d 86 (5th Cir. 1982). In the present case, each of the substantive counts were based on dealings with separate victims, not repetitive mailings to the same victim. Furthermore, the presentence report identified 629 different victims who were defrauded of a total of over five million dollars. The evidence demonstrated that these three appellants were the primary participants, and that Helms was the mastermind in the scheme. This Court determines that the district court did not abuse its discretion, and that the sentences imposed do not violate the eighth amendment. *United States v. Wheeler*, 802 F.2d 778 (5th Cir. 1986), cert. denied, 480 U.S. 908, 107 S.Ct. 1354, 94 L.Ed.2d 524 (1987) (seventy-five years not disproportionate for forty-five counts of money order alterations).

E. VANDERVORT'S CLAIMS

[8] Appellant Vandervort raises several claims to which we now turn.[7]

Vandervort argues that the district court erred by denying Vandervort's motion for severance pursuant to Federal Rules of Criminal Procedure, Rule 8(b). Vandervort contends that the acts alleged in the superseding indictment did not arise out of the same series of acts or transactions as required by Rule 8(b).

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7. In addition to the claims discussed below, Vandervort also argues that the superseding indictment was deficient. Vandervort failed to raise this claim before the district court, therefore, he waived the claim. *United States v. Freeman*, 619 F.2d 1112 (5th Cir. 1980), cert. denied, 450 U.S. 910, 101 S.Ct. 1348, 67 L.Ed.2d 334 (1981).

Vandervort's argument is that the indictment charged him with participating in the "same or similar" offenses as some of the defendants, not with being involved in some of the offenses arising out of the same set of acts or transactions.

Rule 8(b) allows joinder if the defendants are "alleged to have participated in the same act or transaction *or* in the same series of acts or transactions. Fed.R.Crim.P. 8(b) (emphasis added). Vandervort's argument is without merit. Additionally, Vandervort argues that the charges against him should have been severed because he was not charged in all of the counts of the indictment. Rule 8(b) states "all of the defendants need not be charged in each count." The district court did not err by denying Vandervort's motion for severance.

Vandervort next argues that the district court abused its discretion by failing to sever Vandervort's case under Fed.R.Crim.P. 14. To prevail on this claim, Vandervort must show "specific and compelling prejudice." *United States v. Lindell*, 881 F.2d 1313, 1318 (5th Cir. 1989).

Vandervort contends that he was extremely prejudiced by the overwhelming evidence of a conspiracy admitted against Helms, Dennis Harris, and Shirley Harris. This Court has stated that "[d]emonstrating that the evidence is stronger against a co-defendant than oneself does not satisfy the burden of showing *compelling* prejudice." *United States v. Marable*, 574 F.2d 224, 231 (5th Cir. 1978) (citations omitted) (emphasis in original). Furthermore, Vandervort was acquitted by the jury on the conspiracy count. Vandervort has failed to show that the district court abused its discretion.

Finally, Vandervort contends that his rights were violated under the Speedy Trial Act. The Speedy Trial Act required that a defendant be brought to trial within seventy days of the filing of an indictment or from the date that the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date occurs last. 18 U.S.C. Sec. 3161(c)(1). Vandervort was arraigned on August 26, 1987, and trial began November 9, 1987. Vandervort argues that this period of

seventy-five days violates the Speedy Trial Act. However, Vandervort ignores the excusable periods of delay. The period of time from the filing of Vandervort's pretrial motions on August 7, 1987, to the decision on those motions on October 9, 1987, is excusable under 18 U.S.C. Sec. 3161(h)(1)(F). The delay from October 19, 1987, to November 9, 1987, was due to the failure of co-defendant Dunn to appear for trial. This was excusable under 18 U.S.C. Sec. 3161(h)(3)(A). Vandervort's rights were not violated.

III. CONCLUSION

This Court determines that no reversible error occurred in this case; accordingly, we affirm.

AFFIRMED.